

NTSB Order No. EA-3986

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 24th day of September, 1993

Dockets SE-11777 and  
SE-11807

Respondents have appealed from the oral initial decision issued by Administrative Law Judge Jerrell R. Davis at the conclusion of an evidentiary hearing held in this case on September 4, 1991.<sup>1</sup> In that decision, the law judge affirmed the Administrator's orders suspending respondent Parsons' airline

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transport pilot (ATP) certificate for 30 days (with waiver of penalty) based on his alleged violation of 14 C.F.R. 91.9 and 91.75(a), and suspending respondent Hawk's ATP certificate for 15 days, based on his alleged violation of 14 C.F.R. 91.9.<sup>2</sup> For the reasons discussed below, we affirm the law judge's decision and the orders of suspension.

The altitude deviation from which these cases arose occurred on February 17, 1989, while respondent Parsons served as pilot in command and respondent Hawk as first officer, of Metro Express Flight number 964 from Augusta, Georgia, to Atlanta, Georgia. Respondent Parsons was at the controls, and respondent Hawk was (at least initially) responsible for ATC radio communications. Respondents were flying at an assigned altitude of 11,000 feet, and apparently misconstrued a clearance directed to another aircraft (Eastern 374) to descend to 9,000 feet, as a clearance for their aircraft. Although the tape of relevant ATC

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<sup>2</sup> Section 91.9 [now recodified as § 91.13(a)] provided:

**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.75(a) [now recodified as § 91.123(a)] provided, in pertinent part:

**§ 91.75 Compliance with ATC clearances and instructions.**

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. \* \* \* If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

communications reveals a squelch (indicating simultaneous, or blocked, transmissions) immediately following this descent clearance, respondents contend that the "sixty four" which is audible after the squelch is the tail end of their acknowledgement. The relevant air traffic control communications are set forth below:

|         |         |  |
|---------|---------|--|
| 0130:24 | ATC     | And Eastern one -- three seventy four descend and maintain niner thousand. |
| 0130:28 | Unknown | [unintelligible] sixty four.   |
| 0130:31 | ATC     | Eastern three seventy four descend and maintain niner thousand.            |
| 0130:36 | EAL 374 | Down to nine thousand Eastern three seventy four.                          |

(Exhibit C-2.)

Respondent Parsons testified that both he and respondent Hawk<sup>3</sup> heard -- rather than "Eastern one" 374 (as is reflected on the ATC tape) -- "Eastern Metro" 964, and therefore believed the descent clearance was for them. (Tr. 102, 115.) According to respondent Parsons, the airline had once been called Eastern Metro, and although the Eastern Metro terminology had been supplanted approximately six months prior to this incident, some controllers in small towns were still referring to Metro aircraft as Eastern Metro. (Tr. 95-6, 106.) Respondent Parsons further testified that they correctly heard the controller's immediate reissuance of the descent clearance to Eastern 374, and Eastern

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<sup>3</sup> Respondent Hawk did not testify at the hearing.

374's acknowledgment, and admitted they were "a little confused" by it and "even considered that the controller had made a mistake" in clearing two different aircraft to 9,000 feet. (Tr. 102, 122, 125.)

The controller who issued the clearance (Dennis Parman) testified that when he noticed respondents' aircraft at 10,300 feet he then connected it with the tail end of the squelched transmission he had heard one minute earlier,<sup>4</sup> and immediately realized that respondents must have taken the wrong clearance. (Tr. 28-30.) Thus, he instructed, "Metro nine sixty four climb immediately and climb maintain one one thousand you were not given niner thousand." Approximately two minutes later, after respondents had discussed the situation in the cockpit,<sup>5</sup> respondent Parsons contacted ATC and stated, "Yessir we, ah, received that, ah, clearance to descend to niner thousand and read it back." ATC responded, "You did not get it you may have read it back but you were blocked." (Exhibit C-2.)

On appeal, respondents challenge the law judge's credibility finding that controller Parman heard only the "four" at the tail end of the squelched transmission. They argue that, since he

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<sup>4</sup> The law judge credited the controller's testimony that he heard only the "four" (which would have corresponded with the last digit of either respondents' call sign or Eastern 374's call sign) at the tail end of the squelch. (Tr. 24, 27, 205.)

<sup>5</sup> Respondent Hawk was apparently attending to company business on another frequency at the time the deviation was detected by ATC. (Tr. 103.) Thus, during this time, respondent Parsons was responsible for both operation of the aircraft and ATC radio communications.

actually heard "sixty four," controller Parman was on notice that respondents had accepted the wrong clearance and was therefore obligated to correct their mistake before they strayed from their assigned altitude. Respondents further argue that, even assuming controller Parman heard only the "four," he still should have made a blanket broadcast notifying all aircraft on the frequency that the descent clearance was for Eastern 374 only.<sup>6</sup>

Accordingly, respondents argue that, because ATC error (in calling Eastern 374 "Eastern one," and in failing to correct respondents' mistaken acknowledgment) was the primary cause of the deviation, the violations should be dismissed or the sanction at least mitigated.<sup>7</sup>

The Administrator has filed a reply brief arguing that the law judge correctly concluded that the deviation was due solely

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<sup>6</sup> Respondents rely on the opinion testimony of a former military air traffic controller, who has never worked in an FAA facility, that these were the obligations of the controller in this case. (Tr. 146, 148.) In contrast, the Administrator's witness (a controller at the Atlanta tower for 18 years who was instructing controller Parman at the time of this incident) testified that controller Parman's handling of the situation was "totally correct." (Tr. 153-4, 168.) He indicated that, while a general broadcast over the frequency that the clearance was intended only for Eastern 374 (as advocated by respondents' expert) would also have been proper, controller Parman's reclearing of Eastern 374 served the same purpose. (Tr. 168.)

<sup>7</sup> Respondents cite Administrator v. Crawford, 5 NTSB 1000 (1986) (where our dismissal of an order of suspension was based in part on ATC's failure to reaffirm a go-around clearance, and unwittingly reinforcing the respondent's belief that his co-pilot had requested reconsideration of the clearance), and other cases in which sanction was mitigated or eliminated based on ATC's contribution to the incident.

to pilot error,<sup>8</sup> and that he properly affirmed the orders of suspension. We agree.

In our judgment, it was not reasonable for respondents to construe the clearance directed to Eastern 374 (erroneously referred to as "Eastern one" 374) as a clearance for Metro 964. Specifically, we are skeptical of respondents' contention that they expected to be addressed as "Eastern Metro" (which is what they claim to have heard when the controller said "Eastern one"), rather than their proper call sign of "Metro." Even if, as respondent Parsons testified, some small-town controllers were still using the obsolete "Eastern Metro" call sign, that would not justify such an expectation when under the jurisdiction of the Atlanta tower, one of the busiest in the ATC system. (See Tr. 15.) We note that, prior to the "Eastern one" transmission here at issue, respondent Hawk and controller Parman had already communicated several times using the correct "Metro" terminology.<sup>9</sup>

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<sup>8</sup> The law judge found that "[respondents'] picking up the wrong clearance . . . was the first and only error committed." (Tr. 205-6.)

<sup>9</sup> Interestingly enough, those communications consisted primarily of an attempt to clarify respondents' proper flight number, as respondent Hawk had initially repeatedly misidentified the flight as Metro 304 (the flight number of their previous leg (Tr. 116)), a number which controller Parman did not recognize from his flight strips as one which was currently within his sector. (Tr. 18, 20, 44.) We are struck, as apparently was the law judge (see Tr. 205), by the fact that the flight number Hawk apparently mistook as his own (374) was more similar to his previous flight number (304) than to his correct current flight number (964). Taken together, these two factors (Hawk's continued focus and apparent identification with a previous flight number, and his subsequent misappropriation of a clearance

Moreover, we believe that respondents' admitted, and understandable, "confusion" after hearing the second descent clearance to Eastern 374 should have prompted them to seek ATC verification of their belief that they had just received a descent clearance to the same altitude. Their failure to do so is inconsistent with their obligation, as airline pilots, to exercise the highest degree of care and attention to safety.

We agree with the law judge that controller Parman responded properly to the blocked transmission by simply reclearing Eastern 374, and that ATC error played no part in this deviation. We see no reason to disturb the law judge's credibility determination that controller Parman heard only the "four" at the end of the squelch.<sup>10</sup> But even assuming he heard "sixty four," as respondents believe he did, we would still find no fault with his handling of the situation, as those numbers alone would not conclusively indicate that respondents had erroneously taken the clearance.<sup>11</sup> Accordingly, respondents have shown no reason to reverse the orders, or to mitigate the sanctions.<sup>12</sup>

(..continued)  
directed to a similarly-sounding flight number) suggest to us a failure in attentiveness which goes beyond mere mishearing.

<sup>10</sup> See Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

<sup>11</sup> Controller Parman indicated that he was working an extremely busy approach sector in which new aircraft were regularly checking onto his frequency, and that he assumed (reasonably, we think) that such an aircraft attempting to check in was the most likely cause of the blocked transmission following his descent clearance to Eastern 374. (Tr. 30, 45, 49.)

<sup>12</sup> We decline the Administrator's request for reconsideration of our decision in Administrator v. Friday, NTSB Order No. EA-

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeals are denied;
2. The initial decision upholding the orders of suspension is affirmed; and
3. The 15-day suspension of respondent Hawk's pilot certificate shall commence 30 days after the service of this opinion and order.<sup>13</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

(..continued)

2894, reconsideration denied, NTSB Order No. EA-2954 (1989), holding the period of suspension in cases where sanction is waived pursuant to the Aviation Safety Reporting Program is a matter inappropriate for our review. Accordingly, we affirm the order against respondent Parsons without comment as to the propriety of the (waived) 30-day suspension. In contrast, we specifically hold that a 15-day suspension of respondent Hawk's ATP certificate is reasonable and consistent with precedent. See Administrator v. Carlin and Molin, 3 NTSB 1953 (1979); Administrator v. Sundell and Siegel, 3 NTSB 1623 (1979).

<sup>13</sup> For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).